

**ORDER OF THE WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT**

The Wisconsin Department of Workforce Development (Department) adopts the following rule *to renumber and amend* DWD 65.04 (3) and *to create* DWD 65.04 (3) (b) relating to the order of selection for vocational rehabilitation services.

The statement of scope for this rule, SS 084-21, was approved by the Governor on October 7, 2021, published in register No. 790A2, on October 11, 2021, and approved by the Department of Workforce Development on November 4, 2021. The Department previously promulgated Clearinghouse Rule CR 22-008 based on statement of scope SS 084-21.

Analysis Prepared by the Department of Workforce Development

Statutes Interpreted

Chapter 47, Stats.

Statutory Authority

Sections 47.02 (1) and (1m) and 227.11 (2) (a), Stats.

Explanation of Statutory Authority

Section 47.02 (1), Stats., allows the Department to adopt methods of administering the vocational rehabilitation program to maximize federal participation. Section 47.02 (1m), Stats., allows the Department to cooperate with federal government to carry out federal regulations for vocational rehabilitation.

Section 227.11 (2), Stats, provides: "Rule-making authority is expressly conferred on an agency as follows: (a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute...."

Section DWD 65.04 (3) is no longer consistent with federal requirements and it is necessary for the Department to exercise its authority under s. 227.11 (2), Stats., in order to comply with the federal requirements and maximize federal participation pursuant to s. 47.02 (1) and (1m), Stats.

Related Statutes or Rules

Clearinghouse Rule CR 22-008.

Plain Language Analysis

Under chapter DWD 65, the Department's Division of Vocational Rehabilitation (DVR) implements a waiting list called an order of selection that is used to determine which categories of individuals will receive vocational rehabilitation services when resources are not available to serve all categories of eligible individuals who apply for the services. DVR evaluates individuals and places them in categories based on the significance of their disabilities. For DVR to be eligible for federal grants for those services, the order of selection must comply with requirements under Title I of the federal Rehabilitation Act, 29 USC 720 to 751. Prior to passage of the federal Workforce Innovation and Opportunity Act of 2014 (WIOA), Public Law 113-128, the Rehabilitation Act prohibited state agencies such as DVR from providing services under an order of selection to individuals who are not placed in the category for most significant disabilities. However, WIOA amended the Rehabilitation Act to authorize state agencies to provide specific services and equipment for maintaining employment to individuals regardless of their category under the order of selection. In Clearinghouse Rule CR 22-008, the Department amended s. DWD 65.04 (3) to allow DVR to exercise that authority.

Clearinghouse Rule CR 22-008 went into effect on July 1, 2022. On September 15, 2022, Division staff met with the Rehabilitative Services Administration (RSA) of the US Department of Education. The RSA makes grants to state agencies for vocational rehabilitation services under the federal Rehabilitation Act and regularly meets with state agencies regarding eligibility for the grants. At the meeting, the RSA advised Division staff that an additional amendment of s. DWD 65.04 (3) is needed to meet the intent of federal regulations. RSA recommended that DVR's authority to provide services and equipment to individuals for maintaining employment should apply only to individuals in immediate risk of losing employment. This rule amends s. DWD 65.04 (3) as recommended by RSA.

Summary of, and comparison with, existing or proposed federal statutes and regulations

As noted above, the RSA makes grants to state agencies under the federal Rehabilitation Act. Federal regulations implementing the grant program are set forth at 34 CFR Part 361. To be eligible for the grants, a state must have a state plan that is approved by the RSA. 29 USC 721 (a) (1) (A). See also 34 CFR 361.2. If vocational rehabilitation services cannot be provided to all eligible individuals, the state plan must include an order of selection that ensures that individuals with the most significant disabilities are selected first to receive the services. 29 USC 721 (a) (5) (C). However, as noted above, WIOA added a provision to the Rehabilitation Act that authorizes a state, at its discretion, to serve eligible individuals, whether or not they are receiving vocational rehabilitation services, who require specific services or equipment to maintain employment. 29 USC 721 (a) (5) (D); 34 CFR 361.36 (a) (3) (v). In the preamble to regulations implementing the changes to the Rehabilitation Act, as amended by WIOA, the RSA stated that this authority applies to individuals at immediate risk of losing employment, which means individuals who would almost certainly lose their current jobs if not provided specific services or equipment in the very near future that would enable them to retain employment. 81 Federal Register 55667 (August 16, 2016).

Comparison with rules in adjacent states

Order of selection rules in Illinois and Minnesota do not address providing services or equipment for maintaining employment to individuals regardless of their category under an order of selection waiting list. See Ill. Admin. Code title 89, ss. 553.130 and 553.140; Minn. Rules, parts 3300.5010, 3300.5030, and 3325.0135. However, Minnesota State Services for the Blind in the Department of Employment and Economic Development has issued guidance specifying that job retention services are available to individuals who are at risk of losing employment.

Iowa's order of selection rules include a mechanism for providing vocational rehabilitation services and goods for maintaining employment to an individual on an order of selection wait list who is at immediate

risk of job loss. See Iowa Admin. Code 281-56.3 (259) (defining "job retention waiting list") and 281-56.6 (1) c. (making job retention services available to eligible individuals).

Michigan does not appear to have any order of selection rules.

Summary of factual data and analytical methodologies

DVR policy analysts and staff reviewed the Rehabilitation Act, as amended by WIOA, federal regulations, state statutes, and consulted with the Wisconsin Rehabilitation Council. Development of this rule did not involve the gathering, analysis, or use of data. Therefore, s. 227.14 (2m), Stats., does not apply to this rulemaking.

Analysis and supporting documents used to determine effect on small business or in preparation of an economic impact analysis

The statement of scope SS 084-21 was posted for 14 days to solicit comments on economic impact from the public and no comments were received.

Fiscal Estimate and Economic Impact Analysis

See attached.

Effect on small business

The proposed rule will have no significant economic impact on small businesses, as defined in s. 227.114 (1), Stats.

Agency contact person

Questions related to this rule may be directed to:
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Place where comments are to be submitted and deadline for submission

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The deadline for comments was January 25, 2023.

Text of Rule

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SECTION 1. DWD 65.04 (3) is renumbered DWD 65.04 (3) (a) and amended to read:

DWD 65.04 (3) PROVIDING SERVICES UNDER AN ORDER OF SELECTION. (a) If an order of selection is imposed under sub. (1), the department shall provide services to consumers with the most significant disabilities and consumers at immediate risk of losing employment, notwithstanding significance of disability, who require specific services or equipment to maintain employment before serving consumers with less significant disabilities as prescribed under s. DWD 65.07.

SECTION 2. DWD 65.04 (3) (b) is created to read:

DWD 65.04 (3) (b) The department may provide a consumer at immediate risk of losing employment with services or equipment to maintain employment under par. (a) if all of the following are satisfied:

1. The consumer notifies the department that the consumer is at immediate risk of losing employment.

2. The department determines that the consumer would almost certainly lose the consumer's current job if specific services or equipment are not provided in the very near future that would enable the consumer to maintain employment.

SECTION 3. EFFECTIVE DATE. This rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

Dated this ____ day of _____, 2023.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT

By: _____

Amy Pechacek, Secretary-Designee